

On 1/4/05, the director referred the request to the Office of Administrative Hearings (OAH).

On 2/14/05, OAH scheduled a hearing to be held on 5/10/05.

On 4/13/05, the employer requested OAH to postpone the hearing until after a decision by the Oregon Workers' Compensation Rating System Review and Advisory Committee (ORAC), pursuant to ORS 737.505(3), and OAR 836-043-0200 *et seq.* The insurer agreed with the request.

On 5/11/05, OAH rescheduled the hearing to be held on 8/4/05.

On 7/20/05, the employer requested OAH to reschedule the hearing.

On 8/1/05, OAH rescheduled the hearing to be held on 10/18/05.

On 10/18/05, OAH held a hearing. The hearing was conducted by Lawrence S. Smith, an administrative law judge of OAH. The employer appeared and was represented at the hearing by David Lohman, an attorney. The employer called Julie Brown as its witness. The employer's exhibits P1 to P5 were admitted into the record. The insurer appeared and was represented at the hearing by David B. Hatton, an Assistant Attorney General assigned to represent the insurer. The insurer did not call any witnesses. The insured's exhibits A1 to A4, A7, A9 to A10, A12 to A14, and A16 were admitted into the record.

On 11/22/05, OAH issued a proposed order. The proposed order recommended that the director affirm the billing. The proposed order informed the employer and insurer that they could file with the director written exceptions to the proposed order within 30 days after the proposed order was served on the employer and insurer.

On 12/23/05, the director timely received from the insurer written exceptions to the proposed order.

The director did not receive from the employer any exceptions to the proposed order.

On 12/28/05, the director requested OAH to review the exceptions and issue a revised proposed order. See OAR 137-003-0650(3).

On 1/6/06, OAH issued an amended proposed order. The sole issue was whether the insurer correctly billed the employer for workers' compensation insurance premium based on compensation paid by the employer to certain persons called "translink brokerage" drivers. The employer argued that the persons were not, while the insurer argued that the persons were, "workers" as defined in ORS 656.005(30). The amended proposed order applied both the judicially developed "right to control" and "nature of the work" tests.² The amended proposed order concluded that the persons were "workers."³ The amended proposed order continued to recommend that the director affirm the billing. The amended proposed order informed the employer and insurer that they could file with the director written exceptions to the amended proposed order within 30 days after the amended proposed order was served on the employer and insurer.

On 2/2/06, the director timely received from the insurer written exceptions to the amended proposed order.⁴

² In *Woody v. Waibel*, 276 Or 189 (1976), the Oregon Supreme Court established a "right to control" test and a "nature of the work" test to determine whether a person is a "worker" under Oregon's workers' compensation law. In *Rubalcaba v. Nagaki Farms, Inc.*, 333 Or 614, 627 (2002), the court explained that "*Woody* establishes that, in situations in which there is some evidence suggesting that an employer retained the right to control the method and details of a claimant's work, a conclusion about the claimant's status depends on the analytical factors relevant to both tests." The court noted that the "[f]actors relevant to the right to control test have included, for example, whether the employer retains the right to control the details of the method of performance, the extent of the employer's control over work schedules, whether the employer has power to discharge the person without liability for breach of contract, and payment of wages. [*S-W Floor Cover Shop v. Nat'l. Council on Comp. Ins.*, 318 Or 614, 622, 872 P.2d 1 \(1994\)](#)." *Id.* at 618 n 1. The court also noted that "[f]actors relevant to the 'nature of the work' test have included considerations such as whether the work done is an integral part of the employer's regular business and whether the individual, in relation to the employer's business, is in a business or profession of his or her own. *See Woody v. Waibel*, 276 Or 189, 197-98, 554 P.2d 492 (1976)." *Id.* at 619 n 2.

³ The amended proposed order concluded that of the four factors of the "right to control" test, the right to fire factor indicated that the persons were workers, the right to control the details of the method of performance and the method of payment were neutral, and the furnishing of tools and equipment indicated that the persons were not workers; and the "nature of the work" test indicated that the persons were workers.

⁴ The insurer primarily argued that the amended proposed order erroneously concluded that the right to control the details of the method of performance factor of the "right to control" test was neutral because the order found that the persons had considerable discretion in how to transport the customers and the order considered the degree of control by the employer of the persons.

The director did not receive from the employer any exceptions to the amended proposed order.

The director now makes the following final decision in this proceeding.

Findings of Fact, Conclusions of Law and Opinion

The director adopts, and incorporates herein by this reference, the findings of fact, conclusions, and reasoning of the amended proposed order as the findings of facts, conclusions, and reasoning of this final order, except as follows:

On page six, the order found that the persons “had considerable discretion in how to transport the customers” and concluded that “the overall [right to control the details of the method of performance factor of the “right to control” test] is considered neutral.” Based on the agreement and course of dealing between the parties, as evidenced in the record, the director finds that the employer had the right to control substantially how the persons transported the customers, and concludes that the right to control the details of the method of performance factor of the “right to control” test indicates that the persons were workers.

Order

The billing is affirmed.

Notice of Right to Judicial Review

A party has the right to appeal this final order to the Oregon Court of Appeals pursuant to ORS 183.480 and 183.482. A party may institute a proceeding for judicial review by filing with the court a petition for judicial review within 60 days from the date this order was served on the party. If the order was personally delivered to a party, then the date of service is the day the party received the order. If the order was mailed to a party, then the date of service is the day the order was mailed to the party, not the day the party received the order. If a party files a petition, the party is requested to also send a copy of the petition to the Insurance Division.

//
//
//

Dated October 10, 2006

/s/ Joel Ario
Joel Ario
Administrator
Insurance Division
Department of Consumer and Business Services